BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: September 21, 1998
Case Nos: 98-INA-117

In the Matter of:

ALDO'S ITALIAN RESTAURANT
Employer

On Behalf of:

ELEUTERIO LARA
Alien

Appearance: Vivian N. Szawarc, Esq.
for the Employer and the Alien

Before: Holmes, Vittone and Wood
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Eleuterio Lara ("Alien") filed by Employer Aldo's Italian Restaurant ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have

been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On February 2, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Head cook, italian food in its Italian Restaurant.

The duties of the job offered were described as follows:

"Supervise and coordinate activities of workers engaged in cooking italian style dishes, sauces, pastas and desserts. Plan specials, order supplies, keep inventory of food materials. Plan schedules for special events and plan menus."

A high school education and four years experience in the job, or the related job of Cook, Italian Food were required. Wages were $12.74 per hour. The applicant supervises 12 employees and reports to the Owner. (AF-16-64)

On March 5, 1997, the CO issued a NOF denying certification. The CO found: "The requirement of four years of experience in the job offered or in the related occupation of 'Cook, Italian Food' does not appear to meet the employer's true minimum requirements in that at the time the alien was hired he/she did not meet these requirements and was trained or provided the necessary learning opportunities by the employer after being hired." Thus the CO stated the experience requirement must be 0 since alien had gained the experience as a cook working for Employer since 1990. Corrective action would be to delete the requirement and readvertise or to document justification that it is not now feasible to hire anyone with less than this requirement, or that the occupation in which the alien was hired is dissimilar from the occupation for which the employer is seeking labor certification. Also, Employer must document that the alien gained the required work experience or training prior to being hired by the employer. (AF-12-15)

On April 18, 1997, the CO issued a Final Determination denying certification, stating: "We are not persuaded by the Employer's statement that the alternative requirement of 4 year's experience in the related occupation of Cook, Italian food, was to widen the pool of available U.S. applicants. It appears that

was all the experience the alien possessed. The employer did forward, along with the rebuttal, documentation that the alien possessed approximately 6 ½ years as a cook in Mexico. However, the documentation submitted does not show the type of restaurant, the type of food served, or whether the alien's experience as a cook, at that restaurant, included preparing Italian food." (AF-4-6)

On May 21, 1997, the Employer filed a request for review of denial of labor certification. (AF-1-3)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc).

We believe the CO was correct in denying certification since Employer has failed to document that alien had prior experience in Italian cooking prior to employment with Employer. Alien's cooking experience in Mexico was not documented as being an Italian cook, and, therefore, the CO's finding was unrebutted. It is a long held principle that a job opportunity's requirements may be found not to be the actual minimum requirements where an an alien did not possess the necessary experience prior to being hired by the Employer. Bear Stearns & Co. Inc., 88-INA- 427 (July 29, 1989).

Since we find the CO's denial was proper on other grounds, we need not address the issue of "alternative qualifications". We do note, however, that this case would appear to be squarely addressed by the Board's decision in Francis Kellogg, 94-INA-465; The Winner's Circle, 94-INA-544; and North Central Organized Regionally for Total Health, 95-INA-68, (en banc)(Feb. 2, 1998) wherein the Board held that: "Permitting an employer to advertise with qualifications greater than that possessed by the alien, but allowing the alien to qualify with lesser qualifications which are listed in the guise of 'alternate' qualifications, is a violation of 656.21(b)(5)." Under Kellogg which overruled Best Luggage and its progeny, Employer's alternate job experience of "Cook, Italian" as qualifying experience for the position advertised of "Head cook, Italian food" would appear to be not lawful.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

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JOHN C. HOLMES
Administrative Law Judge